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Evidence--Criminal Pretrial Hearing--Evidence Admitted at Pretrial Hearing in Defendant's Absence Is Invalid Basis for Conviction (People v. Anderson, 16 N.Y.2d 282 (1965))

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type of result are, unfortunately, often ineffectual. The pardoning power, often suggested as an ameliorating force in this area, is usually vested solely in the governor of the state. Beset with many responsibilities in addition to the exercise of this power, a governor might find it difficult to strike a proper and judicious balance in its use. Another consideration is the inefficiency which must necessarily result from the exercise of the pardoning power on an *ad hoc* basis.

It is therefore submitted that the most effective remedy for this problem would take the form of statutory enactment. Legislation would not only provide a precise and definite solution, but an imperative one as well. Continued legislative acquiescence in the present situation might well be taken as approval of the currently accepted doctrine as enunciated in the case at bar. This need for legislation has been recognized and adopted by an increasing number of jurisdictions and probably indicates a developing trend in this area of law.

In any event, the fact that some form of change is needed becomes apparent from thoughtful reflection upon the nature of punishment itself. While the purpose of punishment in primitive societies may have been retribution directed at the criminal himself, such a philosophy is inappropriate in a civilized society. Rather, it should be the aim of society to rehabilitate the criminal, and to deter other would-be wrongdoers from committing similar prohibited acts. A rule which denies a prisoner credit for time already served under his original conviction, upon a second conviction for the same crime, has no valid purpose in and of itself. The application of this harsh doctrine results only in resentment of society by men who are required, under the rule of the instant case, to throw years, futilely spent in prisons, into the bottomless pit of legal anachronism.

EVIDENCE — CRIMINAL PRETRIAL HEARING — EVIDENCE ADMITTED AT PRETRIAL HEARING IN DEFENDANT'S ABSENCE IS INVALID BASIS FOR CONVICTION. — On an indictment for a felony, a pretrial hearing was held in the absence of the defendant, at which a motion was made to suppress evidence alleged to have been illegally seized. No explanation was given for the defendant's absence, but his counsel was present at the hearing and actively advocated the defendant's position. The motion was denied, and at the subsequent trial, the defendant and his codefendant were convicted. In reversing both convictions, the New York Court of Appeals *held* that a conviction based upon evidence ruled admissible

at a pretrial hearing conducted in the defendant's absence was contrary to New York public policy as well as a violation of "fundamental fairness." *People v. Anderson,* 16 N.Y.2d 282, 213 N.E.2d 445, 266 N.Y.S.2d 110 (1965).

It was a common-law maxim that no man could be punished without an opportunity to be heard.[1] The reasoning behind this rule has been expressed in terms of the necessity of affording justice, rather than merely rendering the correct decision: "he who determines any matter without hearing both sides, though he may have been right, has not done justice." [2] Consequently, Blackstone states that the accused must be present before any *fact,* in either a civil or criminal proceeding, can be tried.[3] Both the federal and the New York State constitutions protect against the ancient evil of the "secret trial" by insuring that a defendant in certain criminal prosecutions must be present for the proceeding to be valid. This procedural guarantee, although not expressly stated in the United States Constitution, has been considered a requirement of due process.[4]

The landmark decision of *Snyder v. Massachusetts* [5] discussed the extent to which the federal constitution, through the requirement of due process, guarantees a defendant's personal presence at a criminal prosecution. Therein, the United States Supreme Court held that a defendant had no right to be present when the jury was permitted to view the scene of the crime. Mr. Justice Cardozo indicated that an accused's presence at a felony prosecution is guaranteed "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."[6] Consequently, the requirement of personal presence does not exist "when presence would be useless." [7] The Court did not determine whether the viewing of the scene of the crime was technically part of the trial; rather, it relied upon the rule that a state may adopt its own procedural regulations "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [8]

The New York State Constitution expressly states that no person shall be held to answer for a capital or otherwise "infamous crime" unless "the party accused shall be allowed to appear and

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[1] Terrell v. Allison, 88 U.S. (21 Wall.) 289 (1874).

[2] 4 BLACKSTONE, COMMENTARIES *283. Here, Blackstone is quoting the Roman statesman Seneca; the translation is from BLACK'S LAW DICTIONARY 1412 (4th ed. 1951).

[3] 4 BLACKSTONE, COMMENTARIES *283.

[4] See Snyder v. Massachusetts, 291 U.S. 97 (1934).

[5] *Ibid.*

[6] *Id.* at 105-06.

[7] *Id.* at 106-07.

[8] *Id.* at 105.

defend in person . . . ." [9] This right to be present during a criminal trial was clarified by the New York State Legislature when it stated that "if the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel but if the indictment be for a felony the defendant must be personally present." [10] In *Maurer v. People*,[11] the New York Court of Appeals, construing a similar statute in 1870,[12] determined that "trial" referred to "all proceedings had in impanneling [*sic*] the jury, the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, [as well as] receiving and recording the verdict." [13] Therefore, the defendant's absence at any one of these stages in a felony prosecution would be reversible error.[14]

Although it is certain that a defendant has an undeniable right to be present during the *actual* criminal trial, except when the prosecution is for a misdemeanor,[15] the question has arisen as to his right to be present at certain other stages of the prosecution. For example, it has been held that a defendant must be present when the jury returns from retirement for further instructions,[16] but that a defendant's absence from the courtroom is not improper while his attorney argues that the jury should be discharged.[17]

In the principal case, Judge Burke, speaking for the majority,[18] implied that a pretrial hearing to suppress allegedly illegally seized evidence [19] is, in fact, part of the trial.[20] Therefore, since

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[9] N.Y. CONST. art. I, § 6.

[10] N.Y. CODE CRIM. PROC. § 356. Once the right to be present at trial was established, it was held that neither the accused nor his counsel had the power to waive it. Hopt v. Utah, 110 U.S. 574, 579 (1884). However, it is generally held that if the accused is present at the beginning of the trial, and later voluntarily leaves the courtroom, he has waived his constitutional right to be present in felony cases. United States v. Noble, 294 Fed. 689 (D. Mont. 1923), *aff'd*, 300 Fed. 689 (9th Cir. 1924); Mulvey v. State, 41 So. 2d 157 (Fla. 1949).

[11] 43 N.Y. 1 (1870).

[12] N.Y. Sess. Laws 1847, ch. 2, § 13.

[13] Maurer v. People, 43 N.Y. 1, 3 (1870).

[14] *Id.* at 5.

[15] Lewis v. United States, 146 U.S. 370, 372 (1892).

[16] People *ex rel.* Bartlam v. Murphy, 9 N.Y.2d 550, 175 N.E.2d 336, 215 N.Y.S.2d 753 (1961); see People *ex rel.* Paulo v. LaVallee, 22 App. Div. 2d 723, 253 N.Y.S.2d 312 (3d Dep't), *motion for leave to appeal denied*, 15 N.Y.2d 482, 203 N.E.2d 800, 255 N.Y.S.2d 1025 (1964).

[17] People *ex rel.* Lupo v. Fay, 13 N.Y.2d 253, 196 N.E.2d 56, 246 N.Y.S.2d 399 (1963), *cert. denied*, 376 U.S. 958 (1964).

[18] Three judges dissented without opinion.

[19] Defendant had moved to suppress evidence pursuant to Section 813-c of the Code of Criminal Procedure. That section, enacted to conform with the mandate of Mapp v. Ohio, 367 U.S. 643 (1961), provides for a motion to suppress evidence prior to trial. The purpose of section 813-c is merely to provide an orderly procedure for application of the exclusionary rule. People v. Salerno, 38 Misc. 2d 467, 235 N.Y.S.2d 879 (Sup. Ct. 1962). Both parties

Section 356 of the Code of Criminal Procedure requires a defendant's presence during the trial, the Court concluded that the section should be made applicable to pretrial motions to suppress evidence. In support of its holding, the Court indicated that in the absence of a special procedural rule dealing with a pretrial motion to suppress evidence alleged to have been illegally seized, an objection to the admissibility of such evidence would be made during the actual trial when the evidence was offered.[21] In such instances, the right to be present is unquestionable, and should not be lost simply because the legislature has seen fit to provide a hearing prior to trial.[22]

The Court emphasized the importance of the pretrial hearing by indicating that it conclusively determines the admissibility of such evidence for purposes of the trial. Therefore, defendant's absence during such a hearing could substantially affect his cause since he "alone may be able to inform his attorney of inconsistencies, errors and falsities in the testimony of the officers or other witnesses." [23] Consequently, Judge Burke concluded that the interests of fairness and the established public policy of New York required defendant's presence at the pretrial hearing.[24]

Although decisional law prior to the instant case indicated that a defendant has a right to be present at all *critical* stages of his trial, that right does not require his presence at *all* proceedings in the complete presentation of his case. It has always been held, for example, that a defendant is not to be present during the argument of an appeal, or during motions concerning pure questions

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may introduce evidence at the pretrial hearing relating to the seizure and arrest before the motion is decided. People v. Lombardi, 18 App. Div. 2d 177, 239 N.Y.S.2d 161 (2d Dep't 1963).

[20] The Court admits that a pretrial hearing is not strictly within the definition of "trial" as established by prior cases, but relies on People *ex rel.* Steckler v. Warden, 259 N.Y. 430, 182 N.E. 73 (1932), wherein the Court extended the definition of "trial" to include "the examination of criminal cases by a court in all their stages." *Id.* at 432, 182 N.E. at 74.

[21] People v. Anderson, 16 N.Y.2d 282, 286, 213 N.E.2d 445, 447, 266 N.Y.S.2d 110, 112 (1965).

[22] Section 813-d of the Code of Criminal Procedure expressly provides for a motion to suppress *during* the actual trial if one of several specified conditions is present: (1) defendant was unaware of seizure until after the trial had been commenced; (2) defendant was aware of seizure prior to trial, but did not obtain evidence of its illegality until after commencement of trial; or (3) defendant had not had adequate time or opportunity to make a pretrial motion. Since defendant's presence would be insured if he were to make his motion during the trial pursuant to section 813-d, it could be argued that his presence should also be made mandatory if his motion is made prior to trial pursuant to section 813-c.

[23] *Supra* note 21, at 288, 213 N.E.2d at 447, 266 N.Y.S.2d at 113-14.

[24] The Court ruled that the unsuppressed evidence may have prejudiced the codefendant and, thus, his conviction was also set aside.

of law either before or after trial.[25] The present holding does not alter this basic rule; it does, however, indicate that a pretrial hearing to suppress evidence is an important stage of the prosecution. Of potentially greater significance is the fact that the Court implied that a pretrial hearing to suppress evidence is now considered a part of the trial. It appears that all procedural safeguards, heretofore applicable to the *actual* trial, should now be extended to the pretrial hearing as well.

By requiring the defendant's presence at a pretrial hearing, the instant case is in conformity with the prevailing trend of decisions which strive to afford the defendant all possible procedural guarantees. In creating this procedural guarantee, the instant case leaves to conjecture the scope of the right to be present at other pretrial hearings. Nevertheless, one may surmise that *Anderson* will be extended to cover all other pretrial hearings, not merely those brought to suppress evidence pursuant to Section 813-c of the Code of Criminal Procedure. However, since no strict test or rule was formulated, it is impossible, at the present time, to determine with accuracy which pretrial or post-trial stages of the prosecution will be deemed sufficiently "critical" that a defendant's presence will be required.

Although the problem of retroactive application is certain to be raised in future cases because of the present decision, the Court did not discuss this issue.[26] It would not appear that prior convictions based on evidence ruled admissible in a defendant's absence should be overturned merely because of a change in the law subsequent to the conviction. The cogency of the evidence was not affected by the change in the law for, although the defendant was not present at the pretrial determination of admissibility (prior to *Anderson*), he nevertheless had the opportunity to raise all objections to its admission on appeal from the final conviction. The courts should not be obligated to provide post-conviction remedies to review questions that could have been raised on appeal.[27]

In the recent case of *Pointer v. Texas*,[28] the United States Supreme Court held that once it is determined that a defendant is

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[25] See, *e.g.*, *supra* note 17, at 256, 196 N.E.2d at 58, 246 N.Y.S.2d at 401; People v. Vail, 6 Abb. N. Cas. 206 (N.Y. Sup. Ct. 1879); People v. Clark, 1 Park. Cr. Rep. 360 (N.Y. Sup. Ct. 1842).

[26] The possibility expressed here is made evident by recent holdings in: People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965) (coerced confessions); People v. Muller, 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421, *cert. denied*, 371 U.S. 850 (1962) (illegally seized evidence); People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961) (illegally seized evidence).

[27] *Compare* People v. Muller, *supra* note 26, *with* People v. Huntley, *supra* note 26.

[28] 380 U.S. 400 (1965).

entitled to be present at a pretrial hearing, he has the constitutional right to the assistance of counsel in the cross-examination of accusing witnesses.[29] When considered in conjunction with *Pointer,* the practical effect of *Anderson* is to make it virtually impossible for a defendant to be the victim of an unfair pretrial hearing since his presence, both personally and as represented by counsel, is now guaranteed. In this way, an accused's rights cannot be prejudiced.

Although it may be possible that a defendant's rights may be adequately protected in his absence, as Blackstone[30] observed, and as implied in *Anderson,* the *semblance* of justice is essential to a fair hearing. The traditions ingrained in our concept of a fair and impartial trial mandate that an accused be personally present, and that complete justice cannot be effected in his absence.

MILITARY LAW — MANDAMUS — JUDICIAL REVIEW OF COURT-MARTIAL CONVICTION PROPER IN ACTION TO COMPEL SECRETARY OF DEFENSE TO CHANGE PETITIONER'S DISHONORABLE DISCHARGE. — After having been convicted of assault by a general court-martial in 1947, appellant was given a dishonorable discharge from the Navy. During the military trial, when appellant's codefendant gave unexpected testimony which implicated appellant, the common counsel for both parties asserted that he could no longer effectively represent both men. Counsel's request for withdrawal was denied and he was ordered to proceed with the defense. Eighteen years later, in an action in the nature of mandamus,[1] appellant sought to compel the Secretary of Defense to change the record of his dismissal and to issue him an honorable discharge. The Court of Appeals for the First Circuit *held* that because appellant was denied effective counsel during the court-martial, the Secretary of Defense

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[29] See Note, 11 CATHOLIC LAW. 244 (1965).

[30] 4 BLACKSTONE, COMMENTARIES *282-83.

[1] Appellant brought this action under 28 U.S.C. § 1361 (1964), which gives the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer . . . of the United States . . . to perform a duty owed to the plaintiff." Enacted at the same time, 28 U.S.C. § 1391(e) (1964) permits the laying of venue, under the facts of this case in the district of plaintiff's residence, and renders the defendant amenable to service of process by certified mail beyond the territorial limits of the district in which the action is brought. Prior to these provisions, an action in mandamus could be brought only in the District of Columbia. *E.g.,* Knickerbocker Ice Co. v. Sprague, 4 F. Supp. 499 (S.D.N.Y. 1933). For a complete analysis of the use of the mandatory injunction as a method of avoiding the former jurisdictional limitations on mandamus, see Note, 38 COLUM. L. REV. 903 (1938).